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SUPREME COURT OF THE UNITED STATES

October Term, 1939

NO. 681

RAILROAD COMMISSION OF TEXAS, ET AL.,
Petitioners
v.

ROWAN & NICHOLS OIL COMPANY,
Respondent

BRIEF FOR PETITIONERS

On Writ of Certiorari to the United States Circuit
Court of Appeals for the Fifth Circuit.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Texas (R. 64) is reported in 28 F. Supp. 131.

The opinion of the Circuit Court of Appeals (R. 1005) is reported in 107 F. (2d) 70.

**STATEMENT OF GROUNDS OF
JURISDICTION**

The jurisdiction of this court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, (U. S. C. Title 28, Sec-

tion 347). The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered on November 3, 1939 (R. 1010). The petition for the writ of certiorari was filed in this court on January 29, 1940, and the petition for writ of certiorari was granted by this court on March 11, 1940.

STATEMENT OF THE CASE

This suit was brought by the respondent, Rowan & Nichols Oil Company, against the petitioners, the Railroad Commission of Texas and its members and the Attorney General of Texas, seeking injunctive relief against the enforcement of the proration orders for the East Texas field on the ground that the orders deprived respondent of its property without due process of law in violation of the 14th Amendment to the Constitution of the United States in that they denied to respondent an "equal opportunity with other owners in the East Texas field to recover that portion of the oil to which it is entitled" (R. 10). The petitioners in their answer denied that the orders of the Railroad Commission of Texas were arbitrary or discriminatory, and alleged that such orders were necessary for the conservation of oil and gas and that the respondent under the orders of the Railroad Commission of Texas was receiving and would receive in the future its fair share of the recoverable oil in the East Texas field (R. 48). A prayer for an interlocutory injunction was abandoned and the cause was tried on the prayer for a permanent injunction.

The respondent conceded (1) the validity of the statutes authorizing the Railroad Commission to regulate the production of oil and gas "in a reasonable manner" (R. 13); (2) the validity of the total allowable amount of daily production fixed by the Railroad Commission (R. 130, 306, 601); (3) the validity of the spacing and drilling regulations promulgated by the Railroad Commission (R. 4, 21, 374); (4) the legality of all the wells drilled under such regulations (R. 4); (5) the necessity of setting some minimum allowable for each well in the field (R. 328, 633, 638). Despite having conceded that the valid total allowable set for the field must be equitably divided among all the wells in the field with some minimum daily allowable per well to be set at the discretion of the Railroad Commission in the light of the facts adduced at regular administrative hearings, the respondent attacked the method whereby the total allowable production is allocated among the wells in the field drilled in accordance with spacing regulations upon the basis of the potential productive capacity of each well, with a minimum allowable of twenty barrels per well per day below which no well capable of producing that amount is restricted. The respondent prayed that its allowables be set currently in accordance with the ratio that its estimated oil reserves bear to the total estimated reserves for the field. (R. 7)

The specific order attacked was the order of August 29, 1938, and it was agreed that the suit should cover subsequent orders continuing the same method of proration. (R. 666, 667)

The parties stipulated with reference to the method of proration as follows: (R. 995)

1. The total daily allowable for the East Texas Field as fixed by the Railroad Commission order in force at the time of trial was about 522,500-barrels of oil.

2. The order promulgated by the Railroad Commission and in force at the time of trial for the proration of this field allowable among the wells in the field provided: 'the owner or operator or manager of each well in the East Texas Field shall be permitted, either collectively or individually, to produce daily from each well a maximum of two and thirty-two hundredths (2.32) per cent of its hourly potential capacity as determined by the Commission.'

3. In the application and enforcement of the above proration order (a) each well that could not produce as much as 20-barrels of oil per day was allowed to produce the maximum amount that it could produce; (b) where 2.32% of the hourly potential of any well would amount to less than 20-barrels per day, the well was allowed to produce 20-barrels of oil per day; (c) where 2.32% of the hourly potential of any well would amount to more than 20-barrels of oil per day, such well was allowed to produce 2.32% of its hourly potential.

"This application of the order resulted in the following: Approximately 451-wells, not any one of which was capable of producing as much as 20-barrels per day, were allowed to produce daily a total of approximately 5,250-barrels. Approximately 19,032-wells whose individual

hourly potential when multiplied by 2.32% amounted to less than 20-barrels, were each allowed to produce a full 20-barrels per day; or from all of such wells a total of approximately 380,640-barrels per day. These were wells whose hourly potential ranged anywhere from 1-barrel to 860-barrels per hour. Approximately 6,325-wells whose individual potential when multiplied by 2.32% amounted to more than 20-barrels were each allowed to produce daily that number of barrels which equaled the product of its hourly potential multiplied by 2.32%. The total daily production from these wells was approximately 136,610-barrels. These wells had an hourly potential ranging from 865-barrels per hour to about 1,100-barrels per hour. In practical operation, the daily allowable of no well was controlled by the factor 2.32% of its hourly potential unless such well had a potential of 865-barrels or more per hour.

"The Plaintiff offered testimony to show that if each well in the field that could not make 20-barrels per day was allowed to produce the maximum which it was capable of producing, and if every well in the field that was capable of making 20-barrels per day was allowed to produce 20-barrels per day, that the aggregate of such production amounted to some 510,000 or 515,000-barrels of the daily allowable of approximately 522,500-barrels, with the result that only about 7,000 to 12,000-barrels of the total daily production was in the practical application of the order of the Commission prorated on the factor of 2.32% of the hourly potential of the wells.

"4. The testimony shows that the wells were shutdown on Saturdays and Sundays and were

allowed to produce only five (5) days each week and the figures referred to in the testimony were for the days on which the wells were allowed to produce."

Each of the wells on respondent's lease has an hourly potential of about 964 barrels, (R. 95) and under the orders of the Railroad Commission attacked in this case, the daily allowable production of the wells on the respondent's Todd "B" lease was slightly more than 22 barrels per well, or a total for the lease of 111.83 barrels. (R. 107, 611) (See Exhibit 2, offered R. 120, copied R. 675)

Prior to the filing of this suit the respondent filed with the Railroad Commission an application for an increase in the allowable on its Todd "B" lease and in the alternative for permits to drill twenty additional wells. A hearing was held by the Railroad Commission and a permit was granted for a sixth well. (See Exhibit 14, offered R. 348, copied R. 881) No action was taken by the Railroad Commission on the respondent's application for an increase in its allowable. Respondent has not drilled its well No. 6 although the permit to drill such well is still in effect. By drilling the sixth well, respondent could have increased the allowable for its lease to about 133 barrels daily. (R. 612)

The method of proration here attacked is bot-tomed on the known facts concerning the physical factors existing in the East Texas field. The East Texas oil field is a vast body of oil located in the

pore spaces in the eastern extremity of the Woodbine sand formation. The field is about forty miles in length from north to south, has an average width from east to west of about four miles, and has a surface acreage of about 133,000 acres. In cross-section, from west to east, the field is roughly triangular in shape. (R. 353) The top, or long side of the triangle, running upward from west to east, is formed by the Austin chalk formation, which is impermeable and confines the oil in the reservoir at the top. The bottom of the triangle, running approximately horizontally from the western edge of the field to about the middle of the field, is formed by the line of contact of the water in the Woodbine sand with the oil. The third side of the triangle is the Georgetown limestone formation, which begins at the water-oil contact line at about the middle of the field, and extends upward in an easterly direction to the point where it meets the Austin chalk.

The fact that the oil reservoir is triangular in cross-section means that the amount of oil underlying any particular lease depends on its location in the field. The thinnest sections of the field are in the western and eastern edges. (R. 102) From each edge, the oil sand gradually becomes thicker and reaches its maximum thickness of about one hundred feet at about the center of the field.

The amount of recoverable oil beneath any lease is not necessarily in exact proportion to the average thickness of the oil-saturated sand. The sand varies in certain physical characteristics, which affect

the amount and the recoverability of the oil, (R. 509) such as the porosity and permeability of the sand, the size and location of impermeable streaks of volcanic ash and shale, and the amount of connate water. (R. 365, 424) The percentage of oil recovered will also depend on the bottom-hole pressure, which in turn depends on the location of the lease on the structure. The high pressures are on the west side, and the low pressures on the east side. (R. 355)

Almost all of the pressure in the East Texas field is furnished by the water drive, or the pressure of the water on the oil. (R. 361) The pressure arises from the fact that the surface outcrops of the Woodbine sand are about 3600 feet higher than the oil reservoir in the East Texas field, and the entire Woodbine sand (except where it contains oil or gas) is saturated with water. (R. 556) As the oil is withdrawn from the reservoir, the water on the western edge pushes in to take its place. As the water advances, it pushes oil ahead of it. (R. 604-605) The lowest portions of the field, being on the western side of the field, naturally will be drowned out by water first, (R. 409) and the higher portions of the field, in the center of the field in the vicinity of respondent's lease, will be drowned out last. (R. 457, 571) In the center and on the eastern side where the water has not yet encroached, when oil is withdrawn other oil is pushed in to take its place, provided the sand is sufficiently permeable to permit the passage of the oil. (R. 562) In a large section in the center and in the eastern half of the field, includ-

ing the respondent's Todd "B" lease, there is still as much oil in place beneath the surface as there was when the field was discovered, although oil has been produced for over eight years. (R. 462, 621) The eastward migration of oil is, therefore, an important physical factor which affects the amount of oil which will be produced from any property in the East Texas field under any method of proration.

While abandonments on the west side are taking place because of the drowning of the wells by the encroachment of the water, abandonments are also taking place on the east side because of the drop in pressure, due to the fact that pressure is not transmitted across the entire field. (R. 363, 582) The history of the field shows that about two-thirds of the abandonments are taking place on the west side, and about one-third of the abandonments on the east side. (R. 571, 583) The result is that the portion of the field in the neighborhood of respondent's lease will produce longer than any other portion of the field. (R. 572, 583)

The East Texas oil field was discovered in October, 1930, and from said date up to the date of trial, the field produced approximately 1,304,730,000 barrels of oil. (R. 109) At the time of the trial, approximately 25,910 wells had been drilled in the East Texas field, (R. 221) and the average density of drilling of the field was one well to about 5.13 acres. (R. 149) As oil has been withdrawn from the East Texas field, there has been a drop in bottomhole pressure in the field, from an average of about 1625

pounds (R. 354) to an average of about 1106 pounds per square inch. (R. 358) The average water level in the field has risen from an estimated depth below sea level of approximately 3320 feet (R. 367, 378) to approximately 3310 feet, although the rise has been irregular. (R. 295, 378, 389) The highest point in the sand is approximately 130 feet above the average water level. (R. 614)

The respondent's Todd "B" lease contains 24.99 acres upon which it has drilled five wells, all as exceptions as to the spacing rules under special permission of the Railroad Commission. (R. 144) All five wells are flowing wells. The respondent's lease is located in the "fairway," or the portion of the field where the sands are thickest and most permeable, (R. 109, 459, 460) and east of the center of the field. (R. 622) It is situated in a portion of the field where the top of the Woodbine sand is very high (R. 392, 459) and where no water has yet encroached, (R. 621) although it has produced over 355,000 barrels of oil up to the date of the trial. (R. 109, 191) The oil which has been withdrawn has been replaced by other oil, which was drained to respondent's lease from other leases to the west, north and south of respondent's lease. (R. 395, 398, 616) Due to this drainage, the respondent's lease still has in place beneath it substantially the same amount of oil as was originally in place beneath the lease. (R. 456) It has suffered no loss; on the contrary, it has made a net gain by drainage of an amount substantially equal to the amount of oil which has been produced from its lease. (R. 401) The respondent's lease will

produce many years after the leases with thinner sands have gone out of production. (R. 402, 527) As the leases with thinner sands go out of production, the share of the total allowable assigned to respondent's wells will progressively increase. (R. 302, 397, 409, 415, 571)

The District Court, finding for the respondent (R. 64), entered its order (R. 76) enjoining the enforcement of the proration orders of the Railroad Commission, as applied to respondent's property. The court accepted the estimate of the respondent's engineers as to the reserves of oil beneath respondent's tract and the reserves in the entire field, and also their calculation that if the allowable were prorated solely on the basis of reserves of oil in place, when the total daily allowable for the field was 522,000 barrels the proper allowable under the respondent's theory for its Todd "B" lease would be 220 barrels. (R. 132) The District Court by its judgment set up the method of proration to be followed whereby the Railroad Commission was required to fix the amount of the allowable production for the Todd "B" lease at "that amount of oil which bears to the daily field allowable fixed by the Railroad Commission the ratio which 220 barrels bears to 522,000 barrels." (R. 78) The District Court thus laid down the legal principle that proration must be based solely upon the ratio of the estimated oil reserves in a lease to the estimated oil reserves for an entire field, at the time the order is promulgated, without regard to compensating equitable factors designed to assure a fair ultimate recovery over the life of the field for all

portions of the field. The Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court but amended the judgment of the District Court so as to read "without prejudice to the right of the Commission to enter a reasonable proration order and to fairly enforce it." (R. 1010)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that the proration orders of the Railroad Commission are unreasonable, arbitrary and confiscatory of the property of the respondent, and deprive it of its property without due process of law in violation of the 14th Amendment of the Constitution of the United States.

(2) In holding that the proration orders of the Railroad Commission are unreasonable, arbitrary, and confiscatory, such orders being designed to provide a producing schedule whereby each producer may obtain substantially the equivalent of the oil in place beneath his land and an equitable share in the natural reservoir energy of the entire field, because such a schedule provides varying tempos for production which temporarily disproportionately curtail highly productive wells to enable lesser wells to produce their oil before such wells are drowned out by water or their oil is drained away.

(3) In holding that the proration orders of the

Railroad Commission are unreasonable, arbitrary and confiscatory in that a minimum allowable per well is set for all wells at not less than 20 barrels.

(4) In holding that the proration orders of the Railroad Commission are unreasonable, arbitrary and confiscatory in so far as they allocate the allowable production of oil on the basis of the potential producing capacity of each well in the field.

(5) In holding that the Railroad Commission must establish proration in the East Texas field so as to allocate to the respondent's lease a daily allowable production which bears to the total daily allowable for the field the same ratio that the estimated recoverable oil beneath such lease bears to the estimated recoverable oil in the entire field to the exclusion of all other relevant physical and engineering factors.

(6) In holding that the respondent, Rowan & Nichols Oil Company, discharged the burden of proving the illegality of the proration orders of the Railroad Commission attacked in this case.

(7) In failing to hold that the respondent, whose lease is more densely drilled than the average of the East Texas field, whose lease has produced and is allowed to produce more oil per acre under the orders of the Railroad Commission than the average of the field, and whose lease shows substantially no depletion despite the large production from it over an extended period of time, is not in position to com-

plain of the proration orders of the Railroad Commission on the ground that other producers are receiving an allegedly larger proportion of the daily allowable production from the whole field than respondent is receiving.

(8) In failing to hold that the respondent, having made no attacks on the validity of the Railroad Commission's orders for over five years, during which time approximately 17,000 wells have been drilled in the East Texas field in reliance on the validity of the orders of the Railroad Commission and during which time the orders of the Commission have remained substantially unchanged, is estopped to attack the validity of the proration orders.

ARGUMENT

SUMMARY

(1) Under the property law of Texas, a landowner is entitled under proration to recover "a quantity of oil and gas substantially equivalent in amount to the recoverable oil and gas under his land." See *Brown v. Humble Oil & Refining Co.*, 126 Tex. 296, 312. The respondent failed to discharge the burden of showing that it will, under the method of proration attacked, receive less than the equivalent of the oil and gas originally in place under its land, and it particularly failed to show that it is presently being irreparably damaged. Having failed to show irreparable injury to it from the alleged in-

valid features of the orders, respondent is without standing to attack the constitutionality of such orders.

(2) Respondent is further without standing to attack the constitutionality of the proration orders because it has acquiesced in and benefitted from the enforcement of the same method of proration for over five years before bringing this suit. During this period about 17,000 wells representing an investment of over \$170,000,000 have been drilled in the East Texas field in reliance upon the validity and continued enforcement of the method of proration attacked. A large part of this investment would be destroyed by striking down the proration orders of the Commission and adopting the method of proration advocated by the respondent.

(3) On their merits, the proration orders are justified by the necessities of the situation as they affect the performance by the Railroad Commission of its statutory duties to prevent waste and to distribute the allowable production on a reasonable basis. The chief complaint is against the assignment of a minimum or marginal allowable to each well. It was admitted by all of the expert witnesses that it was necessary that *some* marginal allowable be assigned to each well in order to prevent the premature abandonment of a large number of wells. It was admitted further that such premature abandonments would result in the loss of oil which could be recovered only through such wells, and a loss to the owners of such wells of the oil that would have

been produced from such wells. Considering all of the facts relating to the field and its development, the amount of the marginal per-well allowable fixed by the Railroad Commission was not unreasonably high.

(4) The method of proration advocated by the respondent and embraced by the lower courts (that the allowable should be prorated on the basis of oil reserves) would confiscate the property of a large number of operators in the East Texas field, because (1) it would make it impossible for operators in the western and eastern portions of the field to obtain the equivalent of the oil originally in place beneath their land and (2) it would make it impossible for the owner of a small tract of land to drill a well and recover the oil beneath his land. While taking the oil from such operators, it would allow operators in the "fairway," such as respondent, to recover much more than the equivalent of the oil originally in place beneath their leases.

I.

Under the decisions of the Supreme Court of Texas, a landowner under proration is entitled to an opportunity to recover substantially the equivalent of the oil and gas originally in place beneath his land.

The Supreme Court of Texas, prior to the beginning of the regulation of the production of oil and gas by the Railroad Commission, adopted and has

since followed the rule that the owner of an oil and gas lease owned the oil in place beneath the surface of his lease. *Texas Company v. Daugherty*, 107 Tex. 226; *Stephens County v. Mid-Kansas Oil & Gas Company*, 113 Tex. 160; *Waggoner Estate v. Sigler Oil Company*, 118 Tex. 509; *Lemar v. Garner*, 121 Tex. 502; *Sheffield v. Hogg*, 124 Tex. 290. The right of ownership in place was however subject to the correlative right in all leaseholders in the same field, under the rule of capture, to drill wells upon their tracts and to produce all of the oil which would flow to the surface, even though such oil might be drained from beneath other tracts. See *Stephens County v. Mid-Kansas Oil & Gas Company*, 113 Tex. 160, 167; *Prairie Oil & Gas Company v. State* (Texas Commission of Appeals) 231 S. W. 1088, 1091.

The rule of ownership in place and also the rule of capture are necessarily modified by the conservation statutes and the rules promulgated by the Railroad Commission. Under such statutes and rules, the owner of an oil and gas lease is no longer entitled to drill as many wells as he pleases upon his lease, nor can he produce as much oil as he pleases from such wells.

The statutes do not fix any rigid standard to be followed by the Railroad Commission in distributing the allowable production under proration orders. Section 7 of Article 6049c of the Revised Civil Statutes of Texas, as amended, (See Appendix, *infra*, page 65) merely provides that the Railroad Commission must distribute or prorate the allowable

production among the various producers in a field "on a reasonable basis."

The Supreme Court of Texas has discussed the question of the property rights of owners of oil and gas property in the case of *Brown v. Humble Oil & Refining Company*, 126 Tex. 296. In this opinion, the Texas Supreme Court undertook to state the right of the owners of oil and gas property, at common law and under the conservation statutes and regulations, as follows: (126 Tex. 296, 305)

"The common law recognizes no well spacing regulations. At common law the land owner can drill an unlimited number of wells for oil and gas upon his land. *Mills & Willingham, Oil & Gas* (1926), §270; *Summers, Oil & Gas* (1927), 73-76. The adjoining land owner cannot complain if wells are drilled near his boundary line. Under this rule the only way the land owner can protect himself is to drill offset wells. *Prairie Oil & Gas Co. v. State*, 231 S. W. 1088 (Tex. Comm. App., 1921); *Hunt v. State*, 48 S. W. (2d), 466 (Texas Civ. App., 1932); *Kelly v. Ohio Oil Co.*, 57 Ohio St., 317, 49 N. E. 399, 39 L.R.A., 765, 63 Am. St. Rep., 721 (1897); *Barnard v. Monongahela Natural Gas Co.*, 216 Pa., 362, 65 Atl., 801 (1907). However, this rule has been modified in this State. Title 102, Vernon's Annotated Texas Civil Statutes, and particularly Arts. 6014, 6029, 6046.

"The rule in Texas recognizes the ownership of oil and gas in place, and gives to the lessee a determinable fee therein. *Lemar v. Garner*, 121 Texas, 502, 50 S. W. (2d) 769; *Humphreys*—

Mexia Co. v. Gammon, 113 Texas, 247, 254 S. W., 296, 29 A.L.R., 607; Waggoner Estate v. Sigler Oil Co., 118 Texas, 509, 19 S. W. (2d), 27; Texas Co. v. Daugherty, 107 Texas, 226, 176 S. W., 717, L.R.A., 1917F, 989.

"Owing to the peculiar characteristics of oil and gas, the foregoing rule of ownership of oil and gas in place should be considered in connection with the law of capture. This rule gives the right to produce all of the oil and gas that will flow out of the well on one's land; and this is a property right. And it is limited only by the physical possibility of the adjoining land owner diminishing the oil and gas under one's land by the exercise of the same right of capture. The following decisions discuss the law of capture as applied in this State: Stephens v. Mid-Kansas Oil & Gas Co., 113 Texas, 160, 254 S. W., 290; Houston & T. C. Ry. Co. v. East, 98 Texas, 146, 81 S. W., 279, 66 L. R. A., 738, 107 Am. St. Rep., 620; Prairie Oil & Gas Co. v. State (Comm. Appls.) 231 S. W., 1088. Both rules are subject to regulation under the police power of a state.

"It is impossible to measure the exact quantity of oil and gas beneath each tract of land. It is equally impossible to fix a standard which will give exact justice to all land owners. Some land owners wish to produce oil and gas to the limit while others desire to keep their oil and gas in the ground and develop it in less quantities. Hence arises the conflict of interests. It is now, however, recognized that when an oil field has been fairly tested and developed, experts can determine approximately the amounts of oil and gas in place in a common pool, and can

also equitably determine the amount of oil and gas recoverable by the owner of each tract of land under certain operating conditions." (Emphasis added)

Later in the same opinion the court said: (126 Tex. 296; 312)

"Conditions may arise where it would be proper, right, and just to grant exceptions to the rule so as to permit wells to be drilled on smaller tracts than prescribed therein. Also, conditions may arise where it would be proper, right, and just to permit tracts to be subdivided and such subdivisions drilled after the adoption of the rule; but in all such instances it is the duty of the Commission to adjust the allowable, based upon the potential production, so as to give to the owner of such smaller tract only his just proportion of the oil and gas. *By this method each person will be entitled to recover a quantity of oil and gas substantially equivalent in amount to the recoverable oil and gas under his land.*" (Emphasis added)

In the recent case of *Gulf Land Company v. Atlantic Refining Company* (Texas Supreme Court, not yet officially reported) 131 S. W. (2d) 73, 80, substantially the same rule was stated:

"It is the law that every owner or lessee of land is entitled to a fair chance to recover the oil and gas in or under his land, or their equivalents in kind."

The foregoing quotations from the opinions of the Supreme Court of Texas are the only statements

which that court has made with reference to the property rights of a landowner under proration. The criterion stated by the court is an ideal to be approximated as closely as possible rather than a standard which must be rigidly followed, for the court has recognized that it is "impossible to measure the quantity of oil and gas beneath each tract of land," or to "give exact justice to all landowners." See *Brown v. Humble Oil & Refining Company*, 126 Tex. 296, 316.

The rule laid down by the Supreme Court of Texas does not categorically state the time at which the property rights of the landowner in oil and gas are to be determined. The court does not specifically say that the owner is entitled to receive substantially the equivalent of the oil and gas *originally* in place beneath his lease when the field is first opened. Respondents here assert that property rights are to be determined by the amount of oil in place beneath his lease *on the date of each proration order*, which the Railroad Commission customarily issues every month or so.

This question is of great practical importance, because of the recognized physical characteristics of the East Texas oil field. Under proration, the rate of depletion in the different portions of the field varies greatly, so that the proportion of the total reserves which lies underneath any piece of land is constantly changing. If the right of each landowner is to be determined by the proportion of the total oil reserves beneath his land at the time each order

of the Railroad Commission is issued, the inevitable result will be that the portions of the field that will be first depleted, because they are on the western and eastern edges of the field, will get much less than the amount of oil originally in place. On the other hand, the owners of land in the fairway, where production will continue longer than in any other portion of the field, will get much more than the amount of oil originally in place.

It is submitted that the only reasonable construction to place upon the language in the opinions of the Supreme Court of Texas is that the owner is entitled under proration to receive substantially the equivalent of the oil *originally* in place beneath his land. It was not intended by the proration laws to redistribute the property rights in an oil and gas field, such as the East Texas field, by taking oil away from the owners of properties on the western and eastern sides of the field, and giving it to owners in the center of the field. At the common law, the owners of the properties on the edges of the field would have been permitted to drill as many wells and produce as much oil from such wells as would be necessary to prevent or at least to minimize the loss of oil to the fairway properties. They are prevented from using these methods of self-help by the conservation orders. In order that they may not lose thereby, the Texas Supreme Court has said in effect in *Brown v. Humble Oil & Refining Company, supra*, that the proration orders should be so adjusted that they can recover their oil before their properties are depleted.

The owners of the fairway properties, such as respondent, are not entitled to assert a property right to recover more than the equivalent of the oil originally in place beneath their property. A landowner, such as respondent, who during the producing life of his leases will recover substantially the equivalent of the oil originally in place beneath the lease, is receiving under the Texas property law all that he is legally entitled to demand.

II.

The respondent failed to establish that it is being irreparably injured by the enforcement of the proration orders of the Railroad Commission, because the undisputed evidence shows that the respondent has suffered no physical depletion of its lease, and has benefitted from the operation of the proration orders up to the present time.

Respondent has no standing to attack the proration orders of the Railroad Commission unless it establishes that it is being damaged by the enforcement of such orders. Compare *Premier-Pabst Sales Company v. Grosscup*, 298 U. S. 226; *Aetna Insurance Co. v. Hyde*, 275 U. S. 440; *Utah Power & Light Co. v. Rfost*, 286 U. S. 165; *First National Bank v. Louisiana Tax Commission*, 289 U. S. 60; *Gorieb v. Fox*, 274 U. S. 603; *Roberts & Schaeffer Co. v. Emerson*, 271 U. S. 50.

The enforcement of conservation statutes or reg.

ulations necessarily restricts the present enjoyment of the property affected. To accomplish the purpose of such statutes, it may be necessary to restrict some persons more than others. Exact equality of treatment is a practical impossibility. The question to be decided, therefore, is not whether respondent has been restricted in the enjoyment of some of its property rights or whether it has an exactly equal opportunity with others to produce oil, but whether the restrictions imposed unnecessarily or unreasonably deprive respondent of the use of its property. Reasonable restrictions upon the use of oil and gas property have been upheld. *Henderson Company v. Thompson*, 300 U. S. 258; *Champlin Refining Company v. Corporation Commission of Oklahoma*, 286 U. S. 210; *Ohio Oil Company v. Indiana*, 177 U. S. 190; *Walls v. Midland Carbon Company*, 254 U. S. 300; *Bandini Petroleum Company v. Superior Court*, 284 U. S. 8.

The respondent's lease is located east of the center of the field, (R. 622) and in a portion of the field where the top of the sand is very high. (R. 392, 459) The result of its favorable location is that although there have been produced from this lease about 358,000 barrels of oil, (R. 400; see Exhibit 1, offered R. 120, copied R. 674) *there is in place beneath the lease at this time substantially the same amount of oil as was in place when the East Texas field was first opened.* This was admitted by the experts who testified for the respondents, Mr. Buck (R. 311-312) and Mr. Foran (R. 621).

The expert for the Railroad Commission, Mr. Cottingham (R. 397, 399, 456) testified that the oil which had been withdrawn through respondent's wells has been replaced by oil drained from other leases to the west, north and south of the respondent's lease, and that there had been a net gain by the respondent, due to such migration, of approximately 350,000 barrels of oil. Mr. Cottingham explained that the difference of about 8,000 barrels between the amount produced from the respondent's wells and the amount drained to its lease from other leases was accounted for by the expansion of the oil in the reservoir due to the drop in the reservoir pressure, i. e., that a slightly smaller amount of oil was compressed into the same space because of the lower pressure. (R. 397)

Mr. Rowan testified that the cost of drilling a well is about \$10,000. (R. 158) and that the price of oil is about \$1.25 per barrel. (R. 159) Taking an average price of only \$1.00 per barrel, the respondent has already produced to date from its Todd "B" lease an amount of oil equivalent in value to about seven times the cost of the wells which it has drilled upon its lease.

The Rowan and Nichols tract is now more densely drilled than the average of the field (R. 500-501) and it has a permit to drill a sixth well, which could give it a still greater density advantage and additional allowable of about 22 barrels daily. (R. 612) Considering the field as a whole, there are only 11,465 wells located on leases that are less densely drilled

than respondent's lease, as against about 14,445 wells on leases that are not so densely drilled. (R. 436) Mr. Rowan admitted that every well upon his lease had been drilled by special permission of the Railroad Commission as an exception to the spacing rules and that he has always led in dense drilling in the vicinity of his lease. (R. 149, 152) The result of the early and comparatively dense drilling of the Rowan and Nichols tract has been that the average production per acre from the Rowan and Nichols tract up to the time of the trial has been 14,210 barrels per acre, whereas the average production per acre from the whole field has been only 9,810 barrels per acre. (R. 89; see Exhibit No. 1, offered R. 120, copied R. 674; Exhibit No. 2, offered R. 120, copied R. 675) By reason of the density of drilling and the weight given to the potential of its wells, the respondent is now producing about 4.47 barrels per acre daily, whereas the average daily production per acre in the field is 3.92 barrels.

There are certain areas which are more densely drilled than the respondent's lease, but the Circuit Court of Appeals was clearly in error in stating that such densely drilled areas were "nearby leases" (R. 1008). These densely drilled areas are located generally at a distance of fifteen or more miles from the respondent's lease, and do not drain the respondent's lease. This was admitted by Mr. Rowan, who testified that the only densely drilled area within five miles of his lease was the Gladewater area, which by reason of the fact that it was located on the west edge of the field, would have no effect

on draining his lease (R. 164). Mr. Rowan further testified that the densely drilled areas described in Exhibit No. 3 (offered R. 121, copied R. 677), introduced by the respondent, were just picked out to give a general idea of how the field had been developed (R. 166) and that *on the basis of density of drilling, respondent has no complaint.* (R. 167)

So long as respondent's lease is more densely drilled than the average of the field, and particularly since it has been granted by the Railroad Commission a permit to drill a sixth well, which it has neglected to drill, respondent is not in a position to complain because there are still other tracts, which do not drain respondent's tract, which by reason of density of drilling may be receiving a larger per-acre recovery than respondent. Respondent has fared much better than the average, and it cannot complain, on the basis that others are receiving undue benefits, when it at least is being treated fairly. In an analogous situation, Mr. Justice Roberts said in the case of *Kuehner v. Irving Trust Company*, 299 U. S. 445, 455:

"If, however, the statute does not deal unfairly with the petitioners it does not lie in their mouths to object because some one else per-chance will receive a larger proportion of his ultimate loss as the same is ascertained years hence than will the petitioners."

In view of the admitted fact that the respondent has already recovered an amount of oil sufficient to pay back the cost of its wells many times over, that

it has not suffered any physical depletion, that it has recovered much more oil per acre than the average of the field, and that it is still recovering daily an amount of oil far in excess of the cost of operating its wells, respondent certainly cannot claim that it has been or is being irreparably damaged at this time. The only disadvantage it can possibly claim is the fact that it is presently curtailed in its right to enjoy its property. Respondent having conceded that its wells, theoretically capable of producing about 20,000 barrels per day, can legally be curtailed to about 44 barrels per day for purposes of conservation, can hardly contend that it is being unreasonably deprived of its right of present enjoyment by a curtailment of its per-well daily allowable by an additional small fraction of their potential capacity, which the commission has found necessary to protect the correlative rights of all the producers in the field.

III.

Respondent failed to establish that it will be deprived, by the enforcement of the proration orders of the Railroad Commission, of the opportunity of ultimately recovering from its lease an amount of oil substantially equivalent to the amount of oil originally in place beneath its lease.

The respondent failed to present any clear and convincing proof that it will not, during the producing life of its lease, recover substantially the equivalent of the oil and gas originally beneath its lease.

In the first place, the respondent's evidence showed

that there had been wide discrepancies between the estimates which its experts had made of the amount of recoverable oil beneath its lease. The evidence showed that in May, 1933, before a three-judge Federal court at Fort Worth, Mr. Rowan estimated the amount of recoverable oil per acre originally beneath his lease as 45,000 barrels. At the hearing before the Railroad Commission in May, 1938, Mr. Rowan estimated that his original recoverable reserves per acre were 70,000 barrels. At the trial in this action in February, 1939, he estimated the original recoverable reserves per acre at 60,000 barrels. (R. 189-190, 399. See Exhibit No. 37, offered R. 500, copied R. 906). The respondent's own estimates of the amount of recoverable oil originally beneath its lease have thus varied as much as fifty-five per cent, and they varied thirty-three per cent between the time of the hearing before the Railroad Commission in May, 1938, and the trial in February, 1939.

The position taken by the experts for the Railroad Commission was that it is impossible to make any exact estimate of the recoverable oil beneath any lease in the East Texas field, because of the many factors entering into such a calculation which could not be known with certainty. These factors include the water level, the top of the Woodbine sand formation, the thickness and extent of shale partings and lenses, the degree of porosity and permeability of the Woodbine sand, the amount of connate water, and the bottomhole pressure. See the testimony of Mr. Cottingham (R. 365, 366, 369, 380, 381, 382, 387, 389) and the testimony of Mr. Hudnall. (R. 509-518)

Even Mr. Buck, one of respondent's experts, (R. 234) and Mr. Rowan himself (R. 163, 171-174) admitted that there are irregularities in the sand, and that variations occur which would affect the accuracy of any estimate of recoverable reserves.

The respondent's calculations that it had been hurt by the proration order in the past, and that it will fail to recover an amount of oil equivalent to the oil in place beneath its lease during the producing life of its lease, are not only based upon assumptions as to recoverable reserves which cannot be established with accuracy, but they also assume certain facts which are contrary to the undisputed physical conditions in the field. For example, with respect to the operation of the proration orders up to the date of the trial, Mr. Rowan first testified that while there were 60,000 barrels per acre originally in place beneath his lease, at the time of the trial there were only 46,000 barrels per acre. (R. 106) This was directly contrary to the plain physical facts, which are that there is substantially as much oil in place beneath respondent's lease now as there was originally, and this fact was admitted by Mr. Foran, one of respondent's experts. (R. 621) This fact was also finally admitted by Mr. Buck, the respondent's other expert, (R. 311-312) who, however, undertook to explain his answer by saying that he meant by "recoverable reserves under a tract," "the amount of oil that he will reduce to possession in his tank, *wherever it might come from.*" (R. 308) It was by means of defining "recoverable oil" in this manner that respondent's experts were able to

arrive at the estimate of a loss to the Rowan & Nichols tract, although in fact there had been practically no physical depletion. (See Exhibit No. 2, offered R. 120, copied R. 675-676)

The respondent's calculations that it would not recover in the future an amount of oil equivalent to its "recoverable oil" were adopted by the District Court and the Circuit Court of Appeals, although the two courts did not adopt the same figures. The District Court found that at the present rate of production, it would take 28 years for the respondent to produce the estimated amount of recoverable oil beneath its tract while the field would be depleted in 11 years. (R. 72) The Circuit Court of Appeals adopted the calculations that it would take 16 or 17 years to deplete the field during which time the respondent "would be permitted to produce only approximately one-half of the oil it owned." (R. 1009) The calculations, both by the District Court and the Circuit Court of Appeals, are apparently based on the figures appearing in Exhibit 2 (offered R. 120, copied R. 675-676).

In addition to the inaccuracies and uncertainties which are due to any calculations as to the amount of oil underneath any tract, it is apparent that it was to the advantage of the respondent to make a high estimate of his own reserves and a low estimate of the reserves of all of the rest of the field, in order to make it appear that the whole field would be exhausted before the respondent would have the opportunity of recovering the oil from its lease. However, the main vice in the respondent's calculations

is that they wholly ignore the actual facts in connection with the production of oil from the East Texas oil field. These calculations are based on the assumptions that there will be in the future the same total field allowable and that the total allowable for the respondent's lease will also remain exactly what it is now. These assumptions wholly ignore the fact that the field is being depleted from the edges inward toward the fairway, and that the respondent's lease is in a portion of the field which will produce longer than any other portion of the field. The effect of the way in which the field will actually be depleted is that if the total field allowable is kept constant, the allowable of the respondent's lease will necessarily increase as the wells in the depleted areas go off production. (R. 527) If the field allowable remains constant, the respondent's allowable will necessarily increase, because there will be fewer wells to share in the total allowable, and the estimates based on the assumption that the allowable of respondent's lease would remain the same are therefore misleading. It was finally reluctantly admitted by Mr. Buck, the man who made the calculations, that the allowable of the Rowan & Nichols lease would increase in the future (R. 299-300) and that it would not take as long for that lease to produce its oil as his calculations would indicate. (R. 302)

The experts for the Railroad Commission testified positively that under the method of proration attacked, the respondent, during the producing life of its lease, would be permitted to produce at least the equivalent of the oil originally in place beneath its

lease. This is due to the long productive life of respondent's lease, which is located high on the structure and otherwise very favorably with reference to all surrounding areas. Respondent's lease will be in the area which produces longer than any other portion of the field, the western leases being drowned out by water, and the eastern leases being depleted by reason of the drop in bottomhole pressure in that area. See particularly the testimony of Mr. Cottingham (R. 393-395, 456-457) and Mr. Hudnall (R. 514, 527, 571)

It is respectfully submitted that the lower courts were clearly in error in accepting calculations which were based upon unsatisfactory and highly uncertain estimates, and which involved assumptions wholly without support in the actual physical facts in the East Texas field.

IV.

Respondent is without standing to attack the constitutionality of the proration orders, because it has benefited from and acquiesced in the enforcement of the same method of proration for over five years before bringing a suit to set aside such orders, during which time property rights have vested which would be destroyed by the invalidation of such orders.

Although the East Texas field was opened in October, 1930, early attempts by the Legislature of

the State of Texas, and by the Railroad Commission under its delegated authority, to prorate the East Texas field, were invalidated by the Federal District Courts. *MacMillan v. Railroad Commission of Texas*, D. C. 51 F. (2d) 400; *People's Petroleum Producers, Inc., v. Smith*, D. C., 1 F. Supp. 361. In April, 1933, the Commission passed an order, based on the well potential method of proration. This order was attacked by respondent, Rowan & Nichols Oil Company, as well as other operators, and a hearing on a temporary injunction before Judge Hutcheson and others was held at Fort Worth in May, 1933. (R. 134) See 1 Summers, Oil & Gas (Perm. Ed. 1938) S. 96, n. 46. The Federal Court, finding that the Commission had followed the direction of the court in the prior cases, upheld the Commission's order. The opinion of the court in these cases is not reported, but a reference to the decision is found in *Amazon Petroleum Corporation v. Railroad Commission*, D. C. 5 F. Supp. 633, 636:

"The next suits submitted on application for interlocutory injunction at Fort Worth were unlike any of the others we had had. Some of the plaintiffs in them were complaining that the allowable was too high, some that it was too low, and some that it was not properly apportioned. *Here it is being shown that the commission had at last acted in obedience to the mandate of the statute and the injunction of the court to equitably prorate the allowable over the field in accordance with the different capacities of the wells, we denied the injunction from the bench without opinion.*" (Emphasis added)

The case of *Amazon Petroleum Corporation v. Railroad Commission, supra*, involved a proration order for the East Texas field based on the well potential method of allocation, but in sustaining the order, the court did not specifically pass upon the formula for the distribution of the total allowable.

From the date of the decision in the *Amazon* case (February 12, 1934) up to the filing of the present action by the respondent, there has been no attack on the method of proration in the East Texas field.* The method of proration has remained substantially the same, except that the percentage of the hourly potential permitted to be produced has been reduced from 15 per cent to 2.32 per cent, the marginal allowable has been decreased from 40 barrels to 20 barrels, and shutdown days have been put into effect. Mr. Rowan testified that the present method of proration had been in effect since April, 1933, (R. 134) and Mr. Buck, respondent's expert, who had formerly been employed by the Commission in 1933 and who had kept up with the developments in the field since said date, testified that the method of allocation had always been practically on a per-well basis. (R. 330-331) Since April, 1933, when the last attack was made upon the order by the respondent, 17,000 wells have been drilled in

*Mr. Rowan claimed that he had made certain protests before the Railroad Commission on indefinite dates (R. 138-139) but it was undisputed that prior to bringing this action, respondent had not taken advantage of its statutory right to appeal from the proration orders of the Railroad Commission, which are usually issued monthly. Appeals are allowed by Article 6049c, s. 8, Appendix, p. 66, *infra*.

the East Texas field (R. 524) which admittedly represent an investment of at least \$170,000,000.

It was the position of the respondent at the trial that the Railroad Commission should not consider the fact that the scheme of proration has been in effect for over five years or the number of wells which have been drilled while the order has been in effect. See the testimony of Mr. Rowan. (R. 138) In other words, the court was asked to ignore the fact that the operators who have drilled wells in reliance on the continuance of the method of proration have property rights in their wells, in addition to the property rights in the oil beneath their land. In effect, the court was asked to say to an operator who had diligently drilled his lease under the spacing rules of the Railroad Commission that he was "a fool for having drilled four wells where one would be enough." (Compare *MacMillan v. Railroad Commission*, D. C. 51 F. (2d) 400, 402).

For over five years the respondent has acquiesced in and benefited from the proration scheme now attacked. By May 1, 1934, it had drilled the last of its five wells, all of which were drilled as exceptions to Rule 37. By its dense drilling, respondent has caused adjoining owners to drill 20 wells as offsets. (R. 149) The density of drilling on its lease has been one well to 4.99 acres, a density which has not yet been reached by the average in the field. The result of respondent's early and comparatively dense drilling and the distribution of the allowable under the well potential plan has been that re-

spondent. has recovered approximately 50 per cent more oil per acre from its lease than the average of the field, and has made a net gain by drainage from other leases of about 350,000 barrels. (R. 397)

The presumption of validity which attaches to the Railroad Commission's orders is fortified by the acquiescence continued over a period of more than five years. *Life and Casualty Insurance Company of Tennessee v. McCray*, 291 U. S. 566.

By accepting the benefits of the proration order for over five years, the respondent has lost its standing to attack the constitutionality of such orders. Compare *Pierce Oil Corporation v. Phoenix Refining Company*, 259 U. S. 125; *St. Louis Malleable Casting Co. v. Prendergast Construction Co.*, 260 U. S. 469.

The confiscatory effect of the change in the proration plan to the method advocated by respondent is discussed at pages 52-56, *infra*. Briefly, the respondent's proposed plan of proration would be confiscatory in two ways: First, by eliminating the 20-barrel marginal allowable, it would so reduce the allowable of wells on small tracts as to make it impossible for the owners of such tracts to produce the oil beneath such tracts; and second, it would confiscate the property of owners of leases on the sides of the field by exaggerating the structural advantage of the "fairway" properties, and by making it impossible for owners on the western

and eastern sides of the field to recover more than a fraction of the oil originally beneath their leases.

V.

Respondent failed to establish that the marginal or minimum allowable assigned to each well in the East Texas field is not reasonably necessary in order to prevent waste and the confiscation of property.

Assuming for the purpose of this discussion that the respondent is entitled to attack the proration orders, we submit that the evidence wholly fails to show that the proration plan is unreasonable or arbitrary. The respondent's essential complaint is against the marginal or minimum per-well allowable, but the respondent failed to show by clear and convincing evidence that in this respect the Railroad Commission has exceeded the proper limits of its administrative discretion.

It is well settled by the decisions of this Court that to all administrative regulations purporting to be made under authority legally delegated, there attaches a presumption of the existence of facts justifying the specific exercise, and that proration orders, for example, will not be held invalid unless they are shown to bear no reasonable relation either to the prevention of waste or the protection of correlative rights, or are shown to be otherwise arbitrary. See *Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55, 69. Compare *Walls v. Midland*

Carbon Co., 254 U. S. 300, 324; *Henderson Co. v. Thompson*, 300 U. S. 258, 264; *Champlin Refining Co. v. Corporation Commission*, 286 U. S. 210, 234. And in reviewing the administrative determination, the court will examine the record, not to see whether the findings of the courts below are supported by evidence, but to ascertain upon the whole record whether it is possible to say that the administrative action is without rational basis. Compare *South Carolina State Highway Department v. Barnwell Brothers, Inc.*, 303 U. S. 177, 191; *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 7.

The top or total field allowable for the East Texas field was fixed by the Railroad Commission as being the approximate amount of oil which could be daily withdrawn from the East Texas field without causing an unduly rapid drop in the bottom-hole pressure. In fixing this figure, the Railroad Commission was discharging its duty to prevent physical waste. (R. 358) After fixing the top allowable for the field, the next step for the Railroad Commission was to distribute or prorate the allowable among the wells in the field. In distributing this allowable, the Commission was under two duties: first, to prevent waste; and second, to prevent confiscation of property. See Revised Civil Statutes, Articles 6014 (c), 6029 (1), 6049c (7), Appendix, *infra*, pages 58-66.

Under the provisions of the marginal well statute, Article 6049b, Revised Civil Statutes (see Appendix, p. 62, *infra*) the Railroad Commission

was prohibited from restricting production from pumping wells which have a daily capacity of not more than 20 barrels. Such wells must be allowed to produce their full capacity. There are only 451 wells in this class. The validity of this classification was not seriously questioned, but the principal complaint was against the action of the Railroad Commission in giving at least 20 barrels per day to all wells in the field that were capable of producing that much.

In the discharge of its duty to prevent waste, the Railroad Commission was required not to reduce the allowable production of any of the wells in the field to such an extent as to cause the physical waste of a substantial amount of recoverable oil, which would result from the premature abandonment of such wells. In complying with the statutory injunction to distribute "on a reasonable basis" it could not unreasonably restrict the production from wells so as to make it impossible for the owners to recover the oil beneath their leases.

The marginal or minimum allowable is 20 barrels to every well which is capable of making that amount, which in effect is reduced to 14.28 barrels per day when averaged over a week, in view of the two-day shutdown required each week. (R. 995)

It was conceded by all of the experts that some minimum allowable is necessary in order to permit the wells that have already been drilled to continue to operate and to produce the oil that can be

produced only through such wells. The only difference of opinion was to the amount of the marginal or minimum allowable.

Mr. Buck, one of the experts for the respondent, testified that his idea was that a minimum allowable of between 15 and 17½ barrels per day should be permitted. (R. 304) He also expressly stated that a minimum allowable was necessary for the prevention of waste. (R. 328)

Mr. Foran, the last expert used by the respondent, testified emphatically that he believed in a minimum, but that he would recommend an average minimum of 10 barrels, rather than 14 barrels, although he would not "say arbitrarily 10 barrels." (R. 633-638)

Mr. Hudnall, one of the experts for the Railroad Commission, testified that a minimum allowable was necessary (R. 521) and that the minimum fixed by the Railroad Commission was a reasonable minimum below which it would not be safe for the Railroad Commission to go without probably causing the waste of recoverable oil. (R. 522, 523, 525)

Mr. Cottingham testified that if the present minimum were reduced, there would be premature abandonments of wells, particularly on the west side (R. 410-411) which would prevent the owners of such wells from recovering their oil, and would result in the trapping of oil which would not be recovered by any well. (R. 411-412, 421, 422)

The view adopted by the District Court was that the Commission should assign to the poor wells "substantially less than 20 barrels each," the exact amount not being stated. (R. 990, 994) The same view apparently was taken by the Circuit Court of Appeals, which said, "It would seem that a more equitable order could be drafted by fixing a lower maximum production for the smaller wells and raising the percentage of potential production allowed. But that is a question to be decided by the Commission as to which we express no opinion." (R. 1009)

The Circuit Court of Appeals was clearly in error in stating, "There is undisputed evidence tending to show that a pumping well in the field averaging five barrels production a day can be operated with some profit, although the cost of installing pumping apparatus would be about \$3,500 a well." (R. 1009) Apparently, the court's statement was based upon the testimony of Mr. Rowan, who testified that he would allow a five-barrel minimum for each tract of 10 acres or less, regardless of the number of wells drilled on such tract. (R. 154) Mr. Rowan, however, stated that his idea of a minimum allowable of five barrels to each ten-acre tract did not have any relation to what oil a man ought to be allowed to take out of his tract in order to pay back the cost of a well (R. 159), and that his testimony that a well could be operated on five barrels was related to wells which have already paid out under the present method of proration, and particularly to wells on the east side, where the expense of pumping water does not exist. (R. 160)

Furthermore, Mr. Hudnall stated that wells on the west side are plugged and abandoned when their production declines to 10 barrels (R. 522-523) and that "14 barrels a day is about the minimum at which they will drill and produce oil" (R. 525). Mr. Foran, one of respondent's witnesses, thought that a 10-barrel marginal for the east side, as well as for the west side, would be proper. (R. 637) Even Mr. Buck testified that an allowable of five barrels per day for flowing wells would cause such wells to go on the pump in "about two weeks," thereby nullifying the benefit of the reservoir pressure in producing the oil as well as necessitating the installation of expensive pumping equipment. (R. 276-278)

The state of the testimony, therefore, with reference to the reasonableness of the amount of the allowable fixed by the Commission, was decidedly not "undisputed" against the Commission's action, and was in such shape that a reasonable person could not say that the Railroad Commission had acted arbitrarily in fixing a minimum allowable of 20 barrels, considering that under the shut-down order the average production was reduced to 14.28 barrels per day. The Railroad Commission is certainly entitled to some latitude in the exercise of its discretion, and it did not go beyond reasonable bounds in this instance.

VI.

The well potential method of allocation is the best practical means of allocating the allowable according

to the productive capacities of the wells and, together with the spacing rules of the Railroad Commission, gives fair consideration to the recoverable oil under each tract.

While some effort was made at the trial to attack the manner in which the potential tests were made by the Railroad Commission, Mr. Rowan finally admitted, "As far as the potential is concerned, I have no complaint." (R. 175)

The well potential method of allocation was first adopted on April 22, 1933, and was upheld by the judgment of the three-judge district court at Fort Worth in May, 1933. See 1 Summers, *Oil and Gas*, (Perm. Ed. 1938) s. 96, n. 46. It has been in effect from that date up until the date of the trial in this case.

The potential tests are made by measuring the actual amount of oil certain key wells will flow during an hour's time under given conditions. The potential test is the best practical way of ascertaining the productive capacity of a well. (R. 426) The factors affecting the amount of recoverable oil within the drainage area of the well, which are reflected by a potential test, include the porosity and permeability of the sand, the sand thickness, the bottomhole pressure, the position of the lease on the structure and, to some extent, the percentage of connate water. See the testimony of Mr. Cottingham (R. 426-427), Mr. Hudnall (R. 529-530), and Mr. Buck (R. 325). It is true that a potential test

does not necessarily give an indication of any single factor which enters into the productive capacity of a well, since a good well, for example, may have either thick sand and relatively low pressure or thin sand and relatively high pressure. However, since we are only interested practically in determining the manner in which all of the factors will combine in actual operation, it is of relatively little importance to know exactly what part each of the separate factors plays in the total result.

The essential objection to the well potential method of allocation is that it gives too much emphasis to the number of wells on a tract.* In other words, it is argued by respondent that by this method of allocation, undue benefits are given (1) to the operators of leases with thin sands, and (2) to the operators of leases which are densely drilled.

First, it should be pointed out that the relatively narrow spread between the best wells in the field, which receive an allowable of about 26 barrels per day, and the wells receiving the flat per-well marginal allowable of 20 barrels, is caused by the necessities of the situation. It was agreed that the total field allowable was necessarily restricted to about the figure of 522,000 barrels in order to prevent a rapid drop in bottomhole pressure which would result in physical waste. (R. 130, 306, 601) The minimum allowable to each well cannot be safely lowered

*Even a straight per-well allowable has worked satisfactorily in 251 oil fields in Texas. Sixty-six fields are on a well potential basis of allocation. None of these fields have uniform spacing. See the testimony of Mr. Cottingham. (R. 392, 488)

below the present figure without danger of causing physical waste and confiscation. (See pages 38-43, *supra*) The distribution of the minimum allowable to the 25,910 wells in the field takes up nearly all of the total allowable, leaving only a few thousand barrels to be distributed by the Railroad Commission under any formula. (R. 415-416, 482, 572)

Furthermore, in actual operation, the well potential method of distribution does not work unfairly. The answer to the objection that undue preference is given to the leases having thin sands is that such leases will last for a comparatively short time, and that the leases with the thick sands, while at present restricted to an allowable not much greater than the leases on the edge of the field, will ultimately recover their fair share of the oil because of their longer producing life. (R. 391)

The experts agreed that the leases on the west side of the field would be depleted before the leases in the fairway, due to the encroachment of the water as the oil is produced. (R. 288, 394, 571) Furthermore, the history of the field shows that at the same time abandonments are taking place on the west side, abandonments are also taking place on the east side, due to the drop in the bottomhole pressure. (R. 292, 514, 517, 571) About two-thirds of the abandonments have taken place on the west side, and one-third on the east side. (R. 583) The leases in the fairway, like the respondent's leases, will have a longer producing life than any other leases in the field (R. 571) and under the present proration plan

will be permitted to get the most oil. (R. 408) As the wells on the edges of the field are depleted, the allowable of each of the wells in the fairway will be progressively increased. (R. 409, 415) If they were now allowed to produce in proportion to their reserves, they would have the double advantage of a larger present production and a longer producing life. (R. 396, 527)

With reference to the objection that the proration order favors densely drilled tracts, it should be pointed out, first, that while the proration order does not expressly take acreage into consideration, the acreage of each lease is considered by the Railroad Commission in its spacing rules, which must be construed together with its proration orders. In other words, the more acreage an operator has, the more wells he may drill, thereby obtaining a larger allowable for his lease. (R. 481)

Where dense drilling has been permitted by the Railroad Commission, it has been permitted only after a hearing in each case, and only after a finding by the Railroad Commission that the drilling of each particular well was necessary in order to prevent waste or to prevent the confiscation of property. See the provisions of Rule 37, the Railroad Commission's spacing rule, as set forth in Exhibit No. 17 (offered R. 349, copied R. 896). Under the Texas statutes, Article 6049c, Revised Civil Statutes, as amended, (Appendix, *infra*, page 64) any person who has been affected by the granting of any such permit is permitted to appeal to the District Court

of Travis County, Texas, to set aside such permit. Every well now drilled has either been acquiesced in by the affected property owners, or, if attacked in court, has been upheld by the Texas courts.

The method of permitting the drilling of wells as exceptions to Rule 37 is illustrated by the procedure followed in drilling respondent's lease. Because of the shape and area of its lease, respondent was required to obtain special permission to drill each of its wells as an exception to Rule 37. In applying for such permits, respondent represented that "the drilling of these additional wells applied for herein would in no way cause or create physical waste and that the ultimate recovery from said acreage would be greater if these permits were granted and these additional wells drilled, and therefore waste avoided by the recovery of this oil which would not otherwise be brought to the surface." (R. 141) In view of this representation to the Commission when respondent was getting its permits, the contention now comes with ill grace from respondent that in permitting the drilling of wells as exceptions to Rule 37, the Railroad Commission allowed "unnecessary" drilling.

It is impossible to know whether or not any lessee whose lease is densely drilled will recover more or less than the equivalent of the oil originally in place beneath his lease, without knowing the particular facts in connection with the physical characteristics of the oil sands beneath his lease, the length of time his wells have been producing, the probable produc-

ing life of such wells, and all other relevant factors. The history of the field shows that the Woodbine section is "uniformly irregular" (R. 509) and within the same ten-acre area there will be found producing wells, dry holes, and wells which have been plugged and abandoned. (R. 512-15) The respondent in this case, of course, did not attempt to go into the physical situation with reference to each of the wells permitted to be drilled by the Commission. In fact, the District Court refused to go into the merits of the orders granting permits to drill. (R. 493) There was no evidence justifying the court in finding, contrary to the express finding of the Commission in each case where these wells were drilled, that the wells were "unnecessary." In general, the Railroad Commission has attempted to permit drilling without special permit where the drilling distances are greater than 660 feet from another producing well or 330 feet from a boundary line, but has undertaken to supervise the drilling of wells at closer distances. With reference to this matter, the Supreme Court of Texas said in the case of *Gulf Land Company v. Atlantic Refining Company*, 131 S. W. (2d) 73, 80:

"It has devised a plan or pattern by which it starts by allowing wells to be drilled, as a matter of course, at such minimum distances. After that, in order to drill wells, special permits must be had."

The Commission generally has tried to permit each landowner to obtain substantial justice by drilling to substantially the same density as the area sur-

rounding his lease. (R. 427) This is illustrated by the respondent's lease, which at present is about as densely drilled as the surrounding area and the average of the field as a whole, even without drilling its sixth well.

We deem it advisable to refer to one specific instance of a small tract, because it has been referred to repeatedly by the District Court (R. 976, 978, 983), as well as by the respondent in its briefs. This is the one-acre tract of R. M. Wood, which adjoins one corner of the respondent's lease. This tract has been cited repeatedly by the respondent as a horrible example of the effect of the 20-barrel minimum or marginal allowable as it applies to small tracts.

The actual facts in connection with this lease show that the Railroad Commission did not act unreasonably. A permit was granted to R. M. Wood on his one-acre tract on December 23, 1936, (see Exhibit No. 50, offered R. 600, copied R. 955); a motion for rehearing was granted on January 27, 1937, (see Exhibit 51, offered R. 600, copied R. 956) and the permit was finally reaffirmed on March 4, 1937. (See Exhibit 52, offered R. 600, copied R. 957) An appeal was taken from the order of the Railroad Commission by Rowan & Nichols Oil Company and Shell Petroleum Corporation to the District Court of Travis County, Texas. Rowan & Nichols Oil Company and Shell Petroleum Corporation lost their suit in the district court, and the judgment of the district court was affirmed in the Court of Civil Appeals. *Shell Petroleum Corporation v. Railroad*

Commission, 120 S. W. (2d) 526. Application for writ of error was dismissed by the Texas Supreme Court.

The R. M. Wood permit was granted "to prevent confiscation of property." Wood did not drill his well until August, 1937, and at that time respondent had been producing from its lease for over six years. (R. 114) During this time, respondent and other adjacent producers had been draining oil from underneath Wood's tract to the extent of about 10,000 barrels. (R. 569) Taking the respondent's estimate of the recoverable oil beneath its lease, (see Exhibit 37, offered R. 500, copied R. 906) Wood originally had underneath his one-acre lease about 60,000 barrels of recoverable oil. With an allowable of about 22 barrels per day, it would take Wood 2,727 days to produce his recoverable oil, or over 10 years on the basis of 261 producing days each year, considering the two-day shutdown each week. (Compare Exhibit No. 2, offered R. 120, copied R. 675) In other words, it will be about eight years in the future before R. M. Wood will be able to recover the equivalent of the recoverable oil originally underneath his lease. He is just now recovering the equivalent of the oil which was drained from his lease by other producers. Wood has not injured respondent up to the present time, but has merely offset the drainage of his lease by wells belonging to respondent and other producers.

The example of the Wood lease was picked by the respondent for the purpose of showing an extreme

case of discrimination by the Commission but a careful examination of the facts shows that even in this case the Commission has done substantial justice. It is submitted that the District Court and the Circuit Court of Appeals were clearly in error in picking out isolated examples of densely drilled leases and holding that the method of proration was unfair because of the assignment of a minimum per-well allowable to the wells on such leases, without knowing the particular circumstances justifying the granting of the permit or the amount of the allowable in each instance.

VII.

The method of proration, advocated by the respondent and adopted by the lower courts, of prorating the allowable production in proportion to the reserves of oil beneath each lease, would be discriminatory and confiscatory of the property of many operators in the East Texas field and would permit operators in the fairway, such as respondent, to recover much more than the equivalent of the oil originally in place beneath their leases.

It was the claim of the respondent that it is entitled to receive a daily allowable of 220 barrels per day, when the total field allowable is 522,000 barrels per day, on the ground that the field allowable should be based solely on the reserves beneath its lease, as compared to the total reserves in the field. This was the testimony of Mr. Rowan (R.

131-132) The District Court embraced this method of proration by permanently enjoining the Railroad Commission from interfering with the production by complainant of "that amount of oil which bears to the daily field allowable fixed by the Railroad Commission the ratio which 220 barrels bears to 522,000 barrels." (R. 78) The Circuit Court of Appeals modified the judgment to the extent of providing that it should be "without prejudice to the right of the Commission to enter a reasonable proration order and fairly enforce it," (R. 1010) but expressly agreed with the District Court "that in entering an order prorating the amount of oil allowed to be produced from each well, the Commission should take into consideration the amount of oil in place under the lease" (R. 1009-1010) and apparently endorsed the conclusion of the District Court that "essential factors" in allocating the daily allowable were "the depth of sand under each acre and the estimated amount of oil in place." (R. 1008)

A consideration of the physical characteristics of the East Texas field and of its past history leads inescapably to the conclusion that no method of proration could be in effect more discriminatory or confiscatory of a large number of operators than the method of prorating the allowable on the basis of the current estimated reserves in place beneath each lease. This method of proration wholly ignores the fact that various portions of the field will have different periods of time within which they can be operated so as to produce their oil. Even the respondent's experts, Mr. Foran (R. 615-617) and Mr.

Buck (R. 288) admitted that because of the physical situation in the field, leases such as the Rowan & Nichols lease would last much longer than leases to the west of them.

The operation of the formula proposed by respondents and adopted by the lower courts can be illustrated by assuming an example of a lease on the west side of the field, having only 10 feet of oil-saturated sand, and having the same acreage as respondent's lease. Such lease under the proposed method of proration would be able to produce daily only one-tenth of the allowable of respondent's lease, which has about 100 feet of sand. This distribution would work fairly if both leases were permitted to produce for the same length of time. However, since respondent's lease will produce much longer than the lease on the west side, the result will be that respondent will produce much more than the recoverable oil beneath its lease, whereas the lease on the west side will have a large part of its oil drained away from it.

The method of proration advocated by the respondent, however, is even more discriminatory against the leases on the west and the east side of the field than in the assumed example, for respondent would have the Commission determine each month the amount of reserves then remaining, and prorate the production on that basis. This would mean not only that the leases in the fairway would have the benefit of their long producing life, but their advantage over the west side and east side

leases would be progressively increased as these other leases were depleted. The effect would be that the man who is presently losing his oil by drainage, would have his hands tied, whereas, the operators in the center of the field, who are suffering no physical depletion, will be given an entirely disproportionate advantage because of their structural location. It was pointed out both by Mr. Cottingham (R. 396-397) and Mr. Hudnall (R. 527) that the use of this method of proration would enable the Rowan & Nichols lease to produce much more oil than was originally in place beneath such lease.

The effect of the decisions of the lower Federal Courts allocating the allowable on a simple ratio would be not only to accentuate the degree of drainage to the fairway leases, but also to give the owners of such leases, such as respondent, a vested right in drainage oil, in conflict with the doctrine of ownership of oil in place and the correlative rights of other owners. In effect, proration would be made the instrument whereby the fairway operators would be guaranteed the opportunity to capture large quantities of oil from less advantageously located producers, who would be effectively prevented from combating drainage of oil from beneath their lands.

Furthermore, the method of proration advocated by respondent would, by eliminating the minimum per-well allowable, result in the confiscation of the property of many operators by so reducing the daily production from many wells as to make it impossible

to operate them. (R. 524) Aside from the waste of oil which would be lost by reason of the premature abandonment of such wells, the effect of such method of proration would be to take oil from some operators and donate it to others. It would be no personal consolation to the owners of leases with small acreage or thin sands to know that at least part of the oil beneath their leases would not be irretrievably lost, but would be recovered by some owner whose lease was larger or more favorably situated.

Compare the language of the Supreme Court of Texas in *Gulf Land Co. v. Atlantic Refining Co.*, 131 S. W. (2d) 73, 80, where, speaking of the duty of the Railroad Commission to permit every owner to recover his fair share of the oil, the court said:

"It is the law that every owner or lessee of land is entitled to a fair chance to recover the oil and gas in or under his land, or their equivalents in kind. *Any denial of such fair chance would be 'confiscation' within the meaning of Rule 37 and the Rule of May 29th.*" (Emphasis added).

CONCLUSION

The decisions of the lower courts not only set aside the orders of the Railroad Commission properly within its administrative discretion, but require the setting up of a plan of proration which would result in a redistribution of property rights in a vast oil field contrary to the property law of Texas. For the reasons stated, it is respectfully submitted that the

judgment of the Circuit Court of Appeals for the Fifth Circuit, affirming the judgment of the District Court for the Western District of Texas, should be reversed.

Respectfully submitted,

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APPENDIX

Texas Statutes Relevant to this Appeal

(All Statutes Listed Below are Included in Texas Revised Civil Statutes, 1925, or Amendments as Indicated, and are Compiled in Volume 17 of Vernon's Annotated Civil Statutes of Texas)

Art. 6014. "Waste"

The production, storage or transportation of crude petroleum oil or of natural gas in such manner, in such amount, or under such conditions as to constitute waste is hereby declared to be unlawful and is prohibited. The term "waste" among other things shall specifically include:

(a) The operation of any oil well or wells with an inefficient gas-oil ratio, and the Commission is hereby given authority to fix and determine by order such ratio; provided that the utilization for manufacture of natural gasoline of gas produced from an oil well within the permitted gas-oil ratio shall not be included within the definition of waste.

(b) The drowning with water of any stratum or part thereof capable of producing oil or gas, or both oil and gas, in paying quantities.

(c) Underground waste or loss however caused and whether or not defined in other subdivisions hereof.

(d) Permitting any natural gas well to burn wastefully.

(e) The creation of unnecessary fire hazards.

(f) Physical waste or loss incident to, or resulting from, so drilling, equipping, locating, spacing or operating well or wells as to reduce or tend to reduce the total ultimate recovery of crude petroleum oil or natural gas from any pool.

(g) Waste or loss incident to, or resulting from, the unnecessary, inefficient, excessive or improper use of the reservoir energy, including the gas energy or water drive, in any well or pool; however, it is not the intent of this Act to require repressuring of an oil pool or that the separately owned properties in any pool be unitized under one management, control or ownership.

(h) Surface waste or surface loss, including the storage either permanent or temporary of crude petroleum oil, or the placing any product thereof, in open pits or earthen storage, and all other forms of surface waste or surface loss, including unnecessary or excessive surface losses, or destruction without beneficial use, either of crude petroleum oil or of natural gas.

(i) The escape into the open air, from a well producing both oil and gas, of natural gas in excess of the amount which is necessary in the efficient drilling or operation of the well.

(j) The production of crude petroleum oil in excess of transportation or market facilities or reason-

able market demand. The Commission may determine when such excess production exists or is imminent and ascertain the reasonable market demand.

The Commission may consider any or all of the above definitions, whenever the facts, circumstances or conditions make them applicable, in making rules, regulations or orders to prevent waste of oil or gas.

Nothing in this Section shall be construed to authorize limitation of production of marginal wells, as such marginal wells are defined by Statute, below the amount fixed by Statute for such wells. (Acts 1919, p. 285; Acts 1929, 41st Leg., p. 694, ch. 313, Acts 1931, 42nd Leg., 1st C. S., p. 46, ch. 26, par. 1; Acts 1932, 42nd Leg., 4th C. S., p. 3, ch. 2, par. 1; Acts 1935, 44th Leg., p. 180, ch. 76, par. 2.)

Art. 6029. Rules and regulations

The Commission shall make and enforce rules, regulations or orders for the conservation of crude petroleum oil and natural gas and to prevent the waste thereof, including rules, regulations or orders for the following purposes:

(1) To prevent the waste, as hereinbefore defined, of crude petroleum oil and natural gas in drilling and producing operations and in the storage, piping and distribution thereof.

(2) To require dry or abandoned wells to be plugged in such way as to confine crude petroleum oil, natural gas, and water in the strata in which

they are found and to prevent them from escaping into other strata.

(3) For the drilling of wells and preserving a record thereof.

(4) To require wells to be drilled and operated in such manner as to prevent injury to adjoining property.

(5) To prevent crude petroleum oil and natural gas and water from escaping from the strata in which they are found into other strata.

(6) To establish rules and regulations for shooting wells and for separating crude petroleum oil from natural gas.

(7) To require records to be kept and reports made.

(8) It shall do all things necessary for the conservation of crude petroleum oil and natural gas and to prevent the waste thereof, and shall make and enforce such rules, regulations or orders as may be necessary to that end.

(9) To provide for the issuance of permits, tenders, and other evidences of permission when the issuance of such permits, tenders, or permission is necessary or incident to the enforcement of its rules, regulations, or orders for the prevention of waste. (Acts 1919, p. 285; Acts 1931, 42nd Leg., 1st C. S.,

p. 46, ch. 26, par. 15; Acts 1932, 42nd Leg., 4th C. S., p. 3, ch. 2, par. 7; Acts 1935, 44th Leg., p. 180, ch. 76, par. 4.)

Art. 6042. Powers not limited

Particular powers herein granted to the Commission shall not be construed to limit the general powers conferred by law, and until set aside or vacated by some order or decree of a court of competent jurisdiction, all orders of the Commission as to any matter within its jurisdiction shall be accepted as prima facie evidence of their validity.

Art. 6049b. Marginal wells defined; curtailing production

Sec. 1. The term "Marginal Well" as used herein means a pumping oil well capable, under normal unrestricted operating conditions, of producing such daily quantities of oil as herein set out as would be damaged, or result in a loss of production ultimately recoverable, or cause the premature abandonment of same, if its daily production were artificially curtailed. The following described wells shall be deemed "Marginal Wells" in this State:

(a) Any pumping oil well within this State having a daily capacity for production of ten (10) barrels or less, averaged over the preceding thirty (30) consecutive days, producing from a depth of two thousand (2,000) feet or less:

(b) Any pumping oil well within this State having a daily capacity for production of twenty (20) barrels or less, averaged over the preceding thirty (30) consecutive days producing from a horizon deeper than two thousand (2,000) feet and less in depth than four thousand (4,000) feet:

(c) Any pumping oil well within this State having a daily capacity for production of twenty-five (25) barrels or less, averaged over the preceding thirty (30) consecutive days, producing from a horizon deeper than four thousand (4,000) feet and less in depth than six thousand (6,000) feet:

(d) Any pumping oil well within this State having a daily capacity for production of thirty (30) barrels or less, averaged over the preceding thirty (30) consecutive days, producing from a horizon deeper than six thousand (6,000) feet and less in depth than eight thousand (8,000) feet:

(e) Any pumping oil well within this State having a daily capacity for production of thirty-five (35) barrels or less, averaged over the preceding thirty (30) consecutive days, producing from a horizon deeper than eight thousand (8,000) feet. (As amended Acts 1933, 43rd Leg., p. 215, ch. 97.)

Sec. 2. To artificially curtail the production of any "Marginal Well" below the marginal limit as set out above prior to its ultimate plugging and abandonment is hereby declared to be waste, and no rule or order of the Railroad Commission of Texas, or

other constituted legal authority, shall be entered requiring restriction of the production of any "Marginal Well" as herein defined. (Acts 1931, 42nd Leg., p. 92, ch. 58.)

Art. 6049c. Oil and gas conservation, powers and duties of Railroad Commission

Powers and duties of Railroad Commission

Sec. 5. The Commission shall have the power, and it shall be its duty, from time to time to inquire into the production, storage, transportation, refining, reclaiming, treating, marketing or processing of crude petroleum oil and natural gas, and the reasonable market demand therefor, in order to determine whether or not waste exists or is imminent, or whether the oil and gas conservation laws of Texas or the rules, regulations, or orders of the Commission promulgated thereunder are being violated.
(As amended Acts 1932, 42nd Leg., 4th C. S., p. 3, ch. 2, par. 3; Acts 1934, 43rd Leg., 2nd C. S., p. 104, ch. 45, par. 1; Acts 1935, 44th Leg., p. 180, ch. 76, par. 5.)

Hearing by Commission as to waste

Sec. 7. Upon the initiative of the Commission, or upon the verified complaint of any person interested in the subject matter, that waste of crude petroleum

oil or natural gas is taking place in this State, or is reasonably imminent, the Commission may hold a hearing, at such time and place as it may fix, to determine whether or not waste is taking place, or is reasonably imminent and what, if any, rule, regulation, or order should be made or what, if any, other action should be taken to correct, prevent or lessen such waste. At said hearing all parties interested shall be entitled to be heard and introduce evidence and to require the attendance of witnesses, and the production of evidence may be required as provided by law. If upon the hearing the Commission shall find that waste is taking place, or is reasonably imminent, the Commission shall make such rule, regulation or order as in its judgment is reasonably required to correct, prevent or lessen such waste.

In the event any such rule, regulation or order which the Commission may adopt provides for the limitation or fixing of the production of crude petroleum oil, or of natural gas from wells producing gas only, in any pool or portion thereof, the Commission shall distribute, prorate, or otherwise apportion or allocate, the allowable production among the various producers on a reasonable basis.

From and after the promulgation of any rule, regulation or order of the Commission it shall be the duty of each person affected thereby to comply with the same. (As amended Acts 1932, 42nd Leg., 4th C. S., p. 3, ch. 2, par. 5; Acts 1935, 44th Leg., p. 180, ch. 76 par. 6.)

Suits authorized by persons aggrieved by
Commission's regulations or orders

Sec. 8. Any interested person affected by the conservation laws of this State relating to crude petroleum oil or natural gas, and the waste thereof, including this Act, or by any rule, regulation or order made or promulgated by the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a Court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission, or the members thereof, as defendants, to test the validity of said laws, rules, regulations or orders. Such suit shall be advanced for trial and be determined as expeditiously as possible and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the Court. In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order; and such laws, rule, regulation or order so complained of shall be deemed prima facie valid. (As amended Acts 1932, 42nd Leg., 4th C. S., p. 3, ch. 2, par. 8; Acts 1935, 44th Leg., p. 180, ch. 76, par. 14.)